Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers	)	WT Docket No. 98-205

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To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION

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SUMMARY

The comments in this proceeding reveal broad-based support among a variety of commenters, including nationwide and regional wireless companies, local and rural telecommunications providers, financial investors, and the international organization of the wireless industry, to eliminate, or at the very least modify, the CMRS spectrum cap rule. Only PCIA, Sprint PCS, and a variety of resellers and mostly smaller carriers oppose any change in the cap. The concerns of these entities are misplaced and should be rejected.

First, PCIA's attempt to rewrite Section 11 to require the presence of "irrevocable" or "ingrained" competition is baseless. The statute simply requires the presence of "meaningful" competition, and the record shows that it has arrived. Today, 98 percent of the nation's population has access to two cellular providers, more than four-fifths of the population has access to three or more competing broadband CMRS providers, and more than two-thirds of the population has access to four to six broadband CMRS providers. As the number of providers has increased, so has both the amount of licensed spectrum (from 50 MHz to 180 MHz) and the effective available capacity. Conversely, the price of wireless services and the degree of market concentration have declined. Taken as a whole, these factors reflect vigorous and robust competition in the CMRS marketplace.

Second, maintaining the cap imposes significant costs upon carriers, consumers, and the marketplace, particularly in rural areas. Specifically, it precludes carriers at or near the 45 MHz limit from offering advanced wireless services and products; it hinders wireless carriers from meeting growing consumer demands while adding additional subscribers; it prevents carriers from taking advantage of market efficiencies; it reduces incentives to lower prices; and it curtails competition in rural and underserved areas by acting as a barrier to entry.

Third, anticompetitive consolidation will not run rampant in the absence of the spectrum cap. As a preliminary matter, some consolidations, properly reviewed and approved, serve the public interest by lowering prices and bringing more and better services to consumers, because carriers are able to take advantage of greater economies of scope. In any event, all proposed consolidations will still have to undergo the Commission's transfer and assignment review process, and must still comply with federal antitrust laws. Moreover, the competitive market itself acts as a strong deterrent to the threat of anticompetitive conduct.

Fourth, it is not "unfair" to change the spectrum cap rule, since doing so will serve the public interest. Despite the prior expectations of a party, the Commission has the statutory authority to change a rule. As shown, meaningful competition between CMRS providers is the public interest predicate to the elimination or modification of the spectrum cap. Concerns that the Commission not change its rules before construction deadlines have expired, if valid, can be addressed by sunsetting the rule, rather than maintaining it indefinitely.

Finally, a "bright line" test is not necessary for administrative convenience or to provide entities making acquisitions with greater certainty than a case-by-case approach. Such concerns support a safe harbor provision, not a spectrum cap.

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BellSouth Corporation ("BellSouth"), by its attorneys, hereby replies to the comments submitted in response to the Commission's *Notice of Proposed Rulemaking*, WT Docket No. 98-205, FCC 98-308 (Dec. 10, 1998), *summarized*, 63 Fed. Reg. 70727 (Dec. 22, 1998) (*Notice*). The comments reveal broad-based support among a variety of commenters, including nationwide and regional wireless companies, local and rural telecommunications providers, financial investors, and the international organization of the wireless industry, to eliminate, or at the very least modify, the CMRS spectrum cap rule. Only the Personal Communications Industry Association ("PCIA"), Sprint PCS, and a variety of resellers and mostly smaller carriers oppose any change in the cap. BellSouth focuses herein on responding to the concerns of those entities.

DISCUSSION

I. THERE IS BROAD-BASED SUPPORT TO ELIMINATE, OR AT LEAST MODIFY, THE CMRS SPECTRUM CAP RULE

The comments reflect support among a diverse group of carriers to eliminate, or at least modify, the 45 MHz CMRS spectrum cap. Larger nationwide carriers like AT&T Wireless Services, Inc. ("AT&T") and GTE Service Corporation ("GTE") demonstrate that given the dramatic changes in the CMRS marketplace since the cap was first adopted, the cap is no longer necessary to promote

competition or to prevent anticompetitive behavior, and therefore should be eliminated.[1] Likewise, regional carriers including BellSouth, AirTouch Communications, Inc. ("AirTouch"), Bell Atlantic Mobile, Inc. ("BAM"), SBC Wireless, Inc. ("SBC"), and Western Wireless Corporation ("Western") show that the existence of meaningful competition compels the elimination of the spectrum cap under Section 11 of the Communications Act, and that maintaining the cap will forestall competitive efficiencies, innovations, and the introduction of new technologies.[2] Local and rural carriers such as Omnipoint Communications, Inc. ("Omnipoint"), Radiofone, Inc. ("Radiofone"), Rural Telecommunications Group ("RTG") and Triton Cellular Partners, L.P. ("Triton") also submit compelling evidence that the current spectrum cap is not necessary to protect competition in rural areas, and may, in fact, be impeding both competition and the introduction of new services and lower prices in those areas.[3]

Similar support to eliminate or modify the cap comes from the financial community. For example, Chase Capital Partners ("Chase") and others demonstrate that the spectrum cap actually frustrates an investor's ability and incentive to provide financing to new competitors.[4] They show

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1 *See* Comments of AT&T Wireless at 4-9 (supporting elimination of the spectrum cap); GTE at 6-18 (supporting elimination of the spectrum cap).

2 *See* Comments of BellSouth at 6-7 (supporting elimination of the spectrum cap); AirTouch at 5-8 (supporting elimination of the spectrum cap); BAM at 2-4, 9-18, 22 (supporting elimination of the spectrum cap); SBC at 2-4, 9-11 (supporting elimination of the spectrum cap); Western at 5-8 (supporting elimination of the spectrum cap).

3 *See* Comments of Omnipoint at 6-7 (supporting raising the spectrum cap to 70 MHz); Radiofone at 6-7 (supporting forbearance from enforcing the spectrum cap); RTG at 1-6, 9-10, 13-14 (supporting elimination of the spectrum cap, or raising the cap to 90 MHz); Triton at 1-2, 4-6 (supporting increasing the spectrum cap attribution standard to 50% and/or increasing the cap to 55 MHz).

4 *See* Comments of Chase at 2, 4 (supporting modification of the spectrum cap attribution standard); *see also* comments of Omnipoint at 6; Triton at 1-2, 4-6.

that changing the cap will enable small and rural entities to attract investors and form the strategic partnerships they need to become viable competitors.

The international wireless industry association, the Cellular Telecommunications Industry Association ("CTIA"), shows that further enforcement of the spectrum cap is no longer appropriate or necessary, given the competitive CMRS marketplace. CTIA also shows that the lack of an "identifiable market failure" makes it appropriate to trust in market forces.[5] CTIA presents a compelling legal analysis to support a Commission decision to repeal or forbear from enforcing the spectrum cap. A more detailed discussion of these arguments is submitted below.

By contrast, the only opposition to eliminating or changing the cap comes from PCIA, representing less than its full membership in this proceeding,[6] Sprint PCS, and a variety of resellers and generally smaller carriers.[7] The concerns of these entities are misplaced, as discussed in the following section, and should be rejected.

II. THE CONCERNS EXPRESSED BY PCIA, SPRINT PCS AND OTHERS ARE MISPLACED, AS THE RECORD REVEALS

A. The Existence of Meaningful CMRS Competition Compels Elimination of the Spectrum Cap

In general, PCIA and Sprint PCS argue that any change in the spectrum cap at this time is premature because the market is still concentrated and is not fully competitive. Sprint PCS also claims that recent changes in the market since the cap was adopted have not obviated the need for

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5 *See* Comments of CTIA at 2 (supporting elimination or forbearance from enforcing the spectrum cap) (citing *Notice* at ¶ 5).

6 *See generally* comments of PCIA; *see also id.* at 1 n.2.

7 *See generally* comments of America One Communications, Inc. ("America One"), DiGiPH PCS, Inc. ("DiGiPH"), D&E Communications, Inc. ("D&E"), MCI WorldCom, Inc. ("MCI"), Northcoast Communications, L.L.C. ("Northcoast"), Sprint PCS, Telecommunications Resellers Association ("TRA"), Telephone and Data Systems, Inc. ("TDS"), Wireless One Technologies, Inc. ("Wireless One").

the cap.[8] To justify its position in opposition to the spectrum cap, PCIA adopts an interpretation of Section 11 that is unsustainable. Section 11 requires the Commission to repeal or modify regulations that are not in the public interest because of "meaningful economic competition."[9] PCIA itself admits that this is the statutory standard.[10]

PCIA acknowledges the existence of competition in the CMRS marketplace, and even recognizes that PCS licensees are "beginning to meaningfully compete with cellular service providers."[11] Nevertheless, it states that the wireless marketplace has not become "irrevocably" competitive.[12] According to PCIA, "[r]eal competition means competitors are ingrained in the marketplace."[13] In other words, PCIA reads "meaningful" competition to mean "irrevocable" or "ingrained" competition, in direct contravention of the statutory language in Section 11. Section 11 requires only "meaningful" competition,[14] and as BellSouth and others demonstrated in their comments, meaningful competition has arrived.[15] Congress did not direct the Commission to engage in a deep, ongoing analysis of how much competition is enough. That is what PCIA's "irrevocable" or "ingrained" competition standard would require. Instead, Congress directed the FCC to step out

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8 *See* Comments of Sprint at 7-13; *id.*, Att. (Decl. of John B. Hayes) at 7.

9 47 U.S.C. § 161(a)(2).

10 *See* Comments of PCIA at 4.

11 *See* Comments of PCIA at 3, 7-10.

12 *See* Comments of PCIA at 8.

13 *See* Comments of PCIA at 9.

14 *See* 47 U.S.C. § 161(a)(2).

15 *See* Comments of AirTouch at summary, 5-9; BAM at 16-18 & Att. 2 (Decl. of Robert W. Crandell & Robert G. Gertner) at 3-4, 6-13; BellSouth at 4-7; GTE at 3, 6-11 & Att. (Decl. of J. Gregory Sidak & David J. Teece) at 10-13; Omnipoint at 3-4.

of the way and eliminate regulations when there is meaningful competition. As PCIA itself acknowledges, meaningful competition is now underway among CMRS providers.[16]

The number of CMRS providers has increased dramatically since the cap was first adopted. In 1994, there were only two cellular providers licensed to provide service in each market, but many population areas were still unserved. Today, 98 percent of the nation's population has access to two cellular providers, more than four-fifths of the population has access to three or more competing broadband CMRS providers, and more than two-thirds of the population has access to four to six broadband CMRS providers.[17] Moreover, the amount of licensed spectrum available for CMRS providers has more than tripled from 50 MHz (25 MHz for each of two cellular providers) to 180 MHz (50 MHz for cellular, 120 MHz for PCS, and 10 MHz for SMR), and the effective capacity has increased as digital technologies have made more efficient use of spectrum.

The price of wireless services has also fallen. And economists have demonstrated that the wireless industry is not highly concentrated.[18]

Taken as a whole, the addition of new competitors, the increase in available spectrum and capacity, the decline in prices, and the lack of market concentration have produced "vigorous competition in the CMRS marketplace,"[19] which is both "robust and increasing."[20]

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16 *See* Comments of PCIA at 3.

17 *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 13 F.C.C.R. 19746, 19752, 19768 (1998) (*Third Annual CMRS Competition Report*); *Notice* at ¶ 45.

18 *See* Comments of BAM, Att. 2 (Decl. of Robert W. Crandell & Robert G. Gertner) at 10-13.

19 Comments of GTE at 3.

20 Comments of BAM, Att. 2 (Decl. of Robert W. Crandell & Robert G. Gertner) at 4.

Nevertheless, both PCIA and Sprint PCS seek to keep the cap in place to ensure that there are several (at least four according to Sprint) competitors in each market.[21] This approach would replace market forces with regulation. This is a competitive industry. To keep it that way (and make it more so), Section 11 instructs the Commission to withdraw from regulating and instead rely on market forces. Thus, the Commission should not try to determine what arbitrary number of providers should ideally be in each market. There is no way to determine what number is "enough."[22] The right number of competitors is how many a free market produces.

The statute wisely does not require the FCC to regulate how many competitors should exist in a market. As long as there is meaningful competition, the Commission's focus must be on the public interest.[23] Even Sprint PCS recognizes that "[i]n the end, the Commission's focus in this proceeding . . . is on the public interest."[24] Under Section 11, the Commission should eliminate a regulation when it becomes unnecessary to the public interest because of meaningful competition.[25] Given the showing of meaningful competition in the record summarized above, it is incumbent upon the Commission to eliminate the spectrum cap.[26]

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21 *See* Comments of PCIA at 4-10, 13; Sprint at 3; *see also* TRA at summary, 6-7.

22 *See* Comments of BAM at 8-14, 20; TRA at summary.

23 *See* Comments of SBC at 7-8.

24 *See* Comments of Sprint at 5.

25 *See* 47 U.S.C. § 161(a)(2); *see also* BellSouth Comments at 4-5.

26 *See Notice*, Separate Statement of Commissioner Powell at 2.

B. Maintaining the Cap Discourages Innovation and Is Harmful to Carriers, Consumers, and the Marketplace, Particularly in Rural and Underserved Areas

PCIA and TRA both argue that the spectrum cap encourages innovation, and that removal of the cap is not necessary to achieve efficiencies.[27] Likewise, D&E argues the cap protects the advancement of competition in rural areas.[28] PCIA and Sprint also claim that there is no evidence that the spectrum cap has been harmful to carriers, consumers, or the marketplace, and that no carrier can demonstrate competitive harm by the cap.[29] In fact, the record reveals just the opposite is true — continued enforcement of the spectrum cap imposes significant costs upon carriers, consumers, and the marketplace, particularly in rural areas.[30]

First, it precludes those carriers at or near the 45 MHz limit from offering advanced wireless services and products, including third generation wireless services. Such services will require significant amounts of additional spectrum — now estimated to total 390 MHz of spectrum — to provide high-speed and high-bandwidth products and services.[31] Second, it hinders wireless carriers from adding subscribers while meeting growing consumer demands for bundled service offerings. For example, as SBC notes, the dedication of available spectrum in high-use areas to deliver mandatory voice service often leaves little unused spectrum to dedicate to advanced features and

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27 *See* Comments of PCIA at 12; TRA at 10.

28 *See* Comments of D&E at 5-10.

29. *See* Comments of PCIA at 14; Sprint at 1, 5, 14.

30 *See, e.g*, Comments of AT&T at 5-7 & Att. (Eval. of Economists Incorporated) at 1, 11; BAM at 21-31 & Att. 2 (Decl. of Robert W. Crandell & Robert G. Gertner) at 17-21; GTE at 3, 5, 19-22, 27-32 & Att. (Decl. of J. Gregory Sidak & David J. Teece) at 34-35; Omnipoint at 4; RTG at ii, 1; SBC at 4, 9-10; Triton at 4-5.

31 *See* BellSouth Comments at 10.

technologies.[32] Third, it prevents carriers from taking advantage of market efficiencies. According to GTE, such efficiency losses include misallocation of carrier's resources, distortions of scope and scale, and retardation of investment and innovation.[33]

Fourth, it reduces incentives to lower prices to gain additional subscribers, because companies at or near the spectrum cap do not have the access to spectrum they need to support such additional subscribers. Also, they are not able to take advantage of market efficiencies that would reduce their cost of doing business, which cost savings could then be passed on to their subscribers.

Finally, the record shows the spectrum cap actually curtails competition, particularly in rural and underserved areas. According to RTG, the spectrum cap "actually acts as a barrier to the entry of new carriers and upgrades of service by existing providers."[34] RTG demonstrates that rural markets have not seen the level of competition or competitive service offerings available in urban areas because of the significant expense of providing coverage in these areas, coupled with the spectrum cap. That is, the cap prevents new entrants from affiliating with existing carriers to offset many of the significant expenses of providing service in rural areas by taking advantage of economies of scale and scope.[35] Thus, eliminating the cap will hasten the arrival of innovation, lower prices, and enhanced competition in both urban and rural areas.

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32 *See* Comments at SBC at 10.

33 *See* Comments of GTE at 25.

34 *See* Comments of RTG at 3.

35 *See* Comments of RTG at 5-6, 8, 10.

C. Antitrust Laws and the FCC's Transfer and Assignment Review Process Will Prevent Industry Consolidation Not in the Public Interest

PCIA, TRA, and Wireless One argue that without the spectrum cap, there is nothing to prevent consolidation from running rampant.[36] To the contrary, given the existence of other regulatory and statutory safeguards, eliminating the cap "will not 'open the floodgates' to a wave of anticompetitive spectrum aggregation."[37] Even in the absence of a cap, all proposed consolidations will still have to undergo the Commission's transfer and assignment review process, which requires public notice and offers and opportunity to comment. The consolidations also must comply with federal antitrust laws.[38] The Commission's complaint procedures exist to address any unlawful anticompetitive conduct that occurs post-consummation.[39] Relying upon these regulatory and statutory safeguards will prevent the unlawful exercise of market power in the CMRS market, without exacting the heavy social costs currently imposed by the spectrum cap, including, *inter alia,* forestalling the introduction of new and innovative services, lower prices, and market efficiencies.[40] Moreover, as noted by GTE's economists, although the antitrust laws are a default mechanism

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36 *See* Comments of PCIA at 7-8; TRA at 4-5; Wireless One at 4.

37 Comments of AirTouch at 14-15.

38 *See* 15 U.S.C. § 18; 47 U.S.C. §§ 214(a), 308(b), 310(d); *see also* comments of AirTouch at 14-15; AT&T at 13-14; BAM at 13-14 & Att. 2 (Decl. of Robert W. Crandell & Robert G. Gertner) at 15-16; CTIA at 17-24; GTE Att. (Decl. of J. Gregory Sidak & David J. Teece) at 27-28; Radiofone at 5; SBC at 8; Western at 12.

39 *See* 47 U.S.C. § 208.

40 *See* Comments of BAM, Att. 2 (Decl. of Robert W. Crandell & Robert G. Gertner) at 15-16.

against monopolization, "[t]he *first* line of defense against anticompetitive conduct is always the retributive threat of competition itself."[41]

Apart from the fact that existing laws and regulatory safeguards exist to prevent anticompetitive conduct in the absence of a cap, however, BellSouth objects to the blanket suggestion of PCIA and Sprint PCS that mergers and consolidations are not in the public interest. There is no firm evidence that mergers involving acquisitions of more than 45 MHz cause harm to competition. Some models predict adverse consequences, but these are of transitory value at most because of the rapidly changing nature of the CMRS market.[42] To the contrary, in some instances mergers and consolidations have actually served to lower prices and bring greater services to consumers, as carriers are able to take advantage of greater economies of scope.[43] Thus, by eliminating the cap, the Commission will still be able to make a reasoned analysis on a proposed transaction, while avoiding an arbitrary limitation that may well curtail certain benefits to consumers.[44]

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41 *See* Comments of GTE, Att. (Decl. of J. Gregory Sidak & David J. Teece) at 27-28; *see also* RTG at 8.

42 *See* Comments of AT&T at 8.

43 *See, e.g.*, Comments of SBC at 9.

44 *See* Comments of SBC at 9.

D. It Is Not "Unfair" to Change the Spectrum Cap Rule When the Resulting Meaningful Competition Serves the Public Interest

PCIA and TDS contend that the Commission's PCS auctions were premised upon a market structure that included a spectrum cap, and that elimination of the cap cannot be justified absent a showing of "extraordinary circumstances."[45] Likewise, they assert that it would be "grossly unfair" to alter the spectrum cap before auction winners have reached their construction deadlines.[46] As a preliminary matter, neither PCIA nor TDS has cited any precedent in support of their propositions. To the contrary, despite the prior expectations of a party, the Commission has the statutory authority to change a rule:

> A change in policy is not arbitrary and capricious merely because it alters the status quo. To the contrary, a changed rule that upsets prior expectations may be sustained if the change is reasonable, and the Commission may reconsider and revise its views as to what would best serve the public interest if it gives a reasoned explanation for the revision.[47]

Section 11 provides the Commission with the vehicle to repeal or modify the spectrum cap rule if maintaining the rule is no longer in the public interest as the result of meaningful competition.[48] As shown above and in BellSouth's comments, meaningful competition between CMRS providers mandates that the Commission eliminate, or at the very least modify, the CMRS spectrum cap.

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45 Comments of PCIA at 10; *see* Comments of TDS at 4.

46 Comments of TDS at 4; *see* Comments of PCIA at 10.

47 *See Nationwide Wireless Network Corporation; For a Nationwide Authorization in the Narrowband Personal Communications Service*, 13 F.C.C.R. 12914, 12920 (1998) (citing *DirecTV v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997); *see also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983).

48 *See* 47 U.S.C. § 161.

In any event, PCIA's concern that the Commission not change its rules before auction winners have reached their final construction deadlines can be addressed by less restrictive means than maintaining the spectrum cap indefinitely. Specifically, as BellSouth proposed in its comments, the Commission could choose to sunset the spectrum cap at the conclusion of five years from the issuance of D, E, and F Block broadband PCS licenses,[49] which would coincide with the Commission's initial five-year build-out requirements for these licensees.[50] Choosing to sunset the spectrum cap would allow a reasonable period of time for new entrants to finish building out their systems and to launch service, without continuing indefinitely a rule which can no longer be justified. Such action is also consistent with the Commission's decision to sunset the resale obligation after the five-year PCS build-out period.[51]

E. A "Bright Line" Test Is Not Necessary

PCIA and Sprint PCS both claim that the spectrum cap should be maintained because of the bright line test that it affords, particularly to avoid administrative costs and delays inherent in a case-by-case approach.[52] This claim appears to be rooted in the Commission's statement that "[a] cap is a bright line test that provides entities who are making acquisitions with greater assurance than a case-by-case approach that if they fall under the cap, the Commission will approve the

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49 The Commission granted the D, E, and F Block broadband PCS licenses on April 28, 1997. *See Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," DA 97-833 (Apr. 28, 1997). This would result in a sunset date of April 28, 2002 for rural markets with only two cellular providers.

50 *See* Comments of BellSouth at 16 (citing 47 C.F.R. § 24.203(b)).

51 *See* 47 C.F.R. § 20.12(b).

52 *See* Comments of PCIA at 16; Sprint PCS at 2.

acquisition."[53] As AT&T's accompanying economic analysis of the spectrum cap concludes, however, the provision of greater certainty to entities making acquisitions supports a safe harbor provision, not a cap.[54] Under such a provision, the Commission could state that it would not challenge an acquisition giving an entity 45 MHz or less of attributable spectrum, while dealing with transactions exceeding that amount on a case-by-case basis. Moreover, it is inappropriate for administrative convenience to take precedence over broad public interest which, in this instance, counsels in favor of eliminating the cap given the competitive nature of the CMRS market.[55]

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53 *See* Comments of Sprint PCS at 2 n.4 (quoting *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 8104-08 (1994)).

54 *See* Comments of AT&T, Att. (Eval. of Economists Incorporated) at 2.

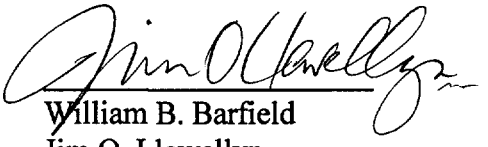
55 *See* Comments of CTIA at 15-17; DiGiPH at 5.

CONCLUSION

Based on the foregoing, BellSouth respectfully submits that the record created in this proceeding, and the existence of very real competition in today's wireless communications marketplace, warrant the elimination or modification of the spectrum cap, as proposed in BellSouth's comments and reiterated herein.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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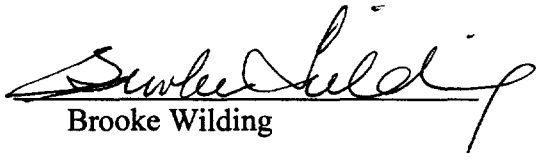

Brooke Wilding

* By hand
+ Includes diskette